SAROJINI NARAIN NAIR

v.

RAJA RATNAM ARUNASALAM

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
MOKHTAR SIDIN JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-652 OF 1996]
20 NOVEMBER 1997

FAMILY LAW: *Divorce - Appeal against decree nisi - Decree nisi recorded by consent - Whether consent of appellant freely obtained - Whether any merits to appeal*

The parties to the proceedings herein were married on 17 May 1994 and had two sons. The marriage broke down and the respondent filed for divorce on 14 September 1996. At the same time, he filed an application for an injunction to prevent further alleged molestation by the appellant and an interim injunction was granted with the application fixed for further hearing on 9 October 1996. On the hearing date, both parties appeared before the High Court. From inquiries made by the judge, it was apparent that the marriage had irretrievably broken down but the appellant indicated that she did not want the divorce. An adjournment was then granted until 2.30pm to allow the parties to discuss the matter and an agreement was arrived at. As a result of this, a consent *decree nisi* was pronounced and the terms of the property settlement and maintenance at RM3,000 per month for the appellant was also recorded by consent. The interim injunction was cancelled with no order as to costs. The entire proceedings were held in English as both parties were English educated.

After some time, the appellant changed her solicitors and on 6 November 1996, the appellant's new solicitors filed a notice of appeal against the whole of the *decree nisi*. The appellant further filed an application for an order to cancel the *decree nisi* and for a new hearing of the divorce petition. In her affidavit in support, the appellant *inter alia* claimed that on 9 October 1996, the consent to the divorce was forcibly obtained from her and the manner in which the divorce petition was disposed of was unjust and unfair. This motion was later withdrawn and the appeal was proceeded with. While the appeal was pending, the respondent filed a notice of motion to strike out the appeal for abuse of process.

Held:
Per Mahadev Shankar JCA

[1] In all the circumstances, the court is satisfied beyond doubt that the appellant and her solicitors freely consented to the *decree nisi* which was made on 9 October 1996. The order was made in the appellant's presence. The appellant is English speaking. She was fully aware of what the trial judge had recorded. If the appellant had in fact been "forced" to agree why did she not say who forced her? The fact that she waited till 19 November 1996 to swear an affidavit spoke for itself. Consequently, the appeal was struck out with costs to be taxed and paid by the appellant to the respondent.

[Appeal struck out with costs to be taxed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak-pihak kepada prosiding ini telah berkahwin pada 17 Mei 1994 dan mendapat dua orang anak lelaki. Perkahwinan mereka mengalami masalah dan responden telah memfailkan satu petisyen penceraian pada 14 September 1996. Pada masa yang sama, beliau juga memfailkan permohonan untuk injunksi untuk menghalang perayu dari terus mengacaunya dan injunksi sementara telah diberikan dengan permohonan ditetapkan untuk perbicaraan pada 9 Oktober 1996. Pada tarikh perbicaraan tersebut, kedua-dua pihak telah hadir di hadapan hakim Mahkamah Tinggi. Dari persoalan yang arif hakim, adalah jelas bahawa perkahwinan mereka telah musnah tetapi perayu telah mengatakan bahawa beliau tidak inginkan penceraian ini. Oleh itu, penangguhan sehingga pukul 2.30 petang telah diberikan supaya mereka boleh membincangkan hal ini dan satu penyelesaian telah dicapai. Akibatnya, *decree nisi* dengan persetujuan telah diberi dan peruntukan penyelesaian hartanah dan nafkah sebanyak RM3,000 sebulan untuk perayu juga dirakamkan. Injunksi sementara dibubarkan tanpa perintah mengenai kos. Segala prosiding dijalankan di dalam Bahasa Inggeris kerana kedua-dua pihak mendapat pendidikan mereka dalam Bahasa Inggeris.

Selepas masa telah berlepas, perayu telah menukar peguamcaranya dan pada 6 November 1996, peguamcara baru perayu telah memfailkan notis rayuan terhadap seluruh *decree nisi* yang telah dirakamkan. Perayu selanjutnya memfailkan satu notis usul untuk perintah membatalkan *decree nisi* dan supaya petisyen penceraian didengar semula. Di dalam afidavit sokongannya, perayu telah antara lain mengatakan bahawa persetujuannya kepada penceraian itu telah didapati darinya dengan cara paksa dan cara petisyen penceraian diselesaikan adalah tidak wajar dan tidak adil. Notis usul ini kemudiannya telah ditarik balik dan rayuan diteruskan. Sementara menunggu pendengaran rayuan tersebut, responden telah memfailkan notis usul untuk membatalkan rayuan tersebut atas alasan ianya menyalahi proses mahkamah.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Di dalam semua keadaan, mahkamah adalah sama sekali berpuas hati bahawa perayu dan peguamcaranya telah memberi persetujuan mereka dengan bebas kepada *decree nisi* yang dibuat pada 9 Oktober 1996. Perintah tersebut dibuat di dalam kehadiran perayu. Perayu bertutur dalam Bahasa Inggeris. Beliau adalah sedar dengan sepenuhnya akan apa yang dirakamkan oleh hakim perbicaraan. Jika perayu telah "dipaksa" untuk memberi persetujuannya kenapa beliau tidak mengatakan siapa yang memaksanya? Beliau telah menunggu sehingga 29 November 1996 untuk membuat afidavitnya yang menunjukkan dengan jelas keaddan sebenarnya. Oleh yang demikian, rayuan ini adalah dibatalkan dengan kos ditaksirkan dibayar oleh perayu kepada responden.

[Rayuan dibatalkan dengan kos ditaksir.]

For the appellant - Rasamani Kandiah; M/s Mohd Latip & Assoc
For the respondent - Atma Singh Veriah; M/s Atma Singh Veriah & Co

[Appeal from High Court, Kuala Lumpur; Divorce Petition No: S5-33-740-1996]

Reported by Cindy Chan

JUDGMENT

Mahadev Shankar JCA:

Sarojini a/p Narain Nair (W) was married to Raja Ratnam a/l Arunasalam (H) on 17 May 1994. They have two sons born in 1975 and 1977. In 1995 W alleges that H left the matrimonial home to live with another woman.

The marriage came under strain. Matrimonial proceedings were initiated. W appointed Encik Jagjit Singh to act as her solicitor on 25 June 1996.

After withdrawing a petition for judicial separation filed earlier, H filed a divorce petition against W on 14 September 1996. At the same time he filed a summons in chambers for an injunction to prevent further alleged molestation by W. An interim injunction was granted and the application was fixed for further hearing on 9 October 1996.

On 4 October 1996 W filed an affidavit in reply.

On 9 October 1996 H and W both appeared before the judge who saw them in chambers and spoke to them in the presence of counsel. H and W are both English educated. W was a teacher before she became involved in direct selling. By this date the time limit for filing the answer had lapsed. W's solicitor had the answer ready but claims he was instructed not to file it yet.

The matter which was to be dealt with that day was whether the interim injunction should be extended. From the affidavits before him the trial judge obviously thought the "Gordian knot" should be cut. In the presence of H, and W and their respective counsel the trial judge inquired their differences, the matrimonial assets available for division, the income available for maintenance of the parties and the education of the two sons in the United Kingdom (both of whom were adults by now) the quantum of maintenance which would be reasonable for W. It was apparent that the marriage had irretrievably broken down but W indicated that she did not want a divorce. The trial judge then adjourned the matter to 2.30pm for each party to take further advice on how best to proceed. Outside the judge's chambers W had a discussion with her solicitor. According to him W then saw the light and agreed that the divorce should go through.

W and her solicitors and H and his solicitors then went before the judge and by consent a *decree nisi* was pronounced and the terms of the property settlement with maintenance at RM3,000 per month for W was also recorded by consent. The interim injunction was cancelled and no order was made as to costs. It is idle to contend that W did not know what was going on at the time because everything was being done in English.

Some time after this W changed her solicitors to Mohd. Latip & Associates. There had been some correspondence about the transfer of some property and the non-acceptance by W of the maintenance cheques. On 6 November 1996 W's new solicitors filed a Notice of Appeal against the whole of the *decree nisi*. W swore an affidavit setting out the entire history. When it came to the events before the trial judge on 9 October 1996 she flatly stated as follows Appeal Record p. 56:

> 21) Upon his arrival, the matter was heard in chambers, wherein I was instructed to consent the divorce and to consent to the maintenance sum of RM3,000/- per month and the said property known as No. 15, Jalan SS 21/25, Damansara Utama be transferred to me.
>
> 22) All along, I made it known to the court and to my solicitors that I did not want a divorce.
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> 23) I presented myself on 9th of October 1996 for an injunction matter, but I was forced to deal with a Divorce Petition which was not even scheduled for trial for the said day.
>
> 24) The consent was forcibly obtained from me, as I was told the terms of settlement would be the same even if it was heard in open court.

25) I was never given the opportunity to present my case to the Honourable Court, neither was I given opportunity to bring witnesses to support my case.

26) There is a co-respondent involved, but this issue was never discussed in terms of damages.

27) The manner in which the Divorce Petition was disposed was unjust and unfair to me specially so.

This affidavit was filed in support of a motion for an order that the *decree nisi* be cancelled and the divorce petition be heard afresh. The motion was fixed for hearing on 7 January 1997. Affidavits in opposition were filed by H.

The motion was not heard on 7 January. On 16 January 1997 both H and Jagjit Singh filed affidavits setting out their versions of what happened. W's solicitors withdrew the motion.

The appeal was proceeded with. A memorandum of appeal was filed on 10 January 1997 more or less repeating all W's complaints made in her affidavit earlier.

Whilst the appeal was pending H filed a motion in the appeal on 3 May 1997 with a supporting affidavit. Affidavits in opposition were filed by W. H's prayer was that this appeal be struck out on the ground that it was an abuse of process.

In all the circumstances we are satisfied beyond doubt that W and her Solicitors freely consented to the *decree nisi* which was made on 9 October 1996. The order was made in W's presence. W is English speaking, she was fully aware of what the trial judge had recorded.

After she changed her solicitors it would appear that she changed her mind. Her affidavit and the grounds urged suggest that with the benefit of hindsight and more resourcesful advice she now felt she could have got a lot more than what she had agreed to.

We regret to say that we found this volte-face most unimpressive. If W had in fact been "forced" to agree why does she not say who forced her? The fact that she waited till 19 November 1996 to swear an affidavit speaks for itself.

Consequently the only order we could make was to strike out this appeal with all costs to be taxed and paid by the appellant to the respondent. The deposit will be paid out to the respondent towards taxed costs.

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